IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5069 OF 1997

1. Kalpataru Builders (Pune)
having its registered office
at 111, Maker Chamber IV,
Nariman Point, Mumbai-400 021.

2. Shri Parag Mofatraj Munot
residing at Munot Villa,
Westfield Estate Road,
Mumbai-400 006. .. Petitioners

Versus

1. Union of India

2. Director of Defence Estates
Ministry of Defence,
Southern Command,
Pune-411 001.

3. The Defence Estates Officer
Pune Circle,
Pune-411 001.

4. Cantonment Executive Officer
having his office at the
Office of the Cantonment Board,
Golibar Maidan,
Pune-411 011.

5. Cantonment Board, Pune
Statutory Board constituted under
the provisions of Cantonment Act, 1924
having its office at Golibar Maidan,
Pune-411 001.

6. The General Officer
Commanding-in-Chief
(Southern Command) having his
office at Head Quarters,
Southern Command,
Pune-411 001. .. Respondents

Dr.Virendra V. Tulzapurkar, Senior Advocate with Mr.Pankaj Savant and Mr.Sanjeev Ahooja for the Petitioners.

Mr.Y.R. Mishra with Mr.D.A. Dubey and Mr.T.C. Kaushik for Respondents Nos.1 to 3 and 6.

Mr.K.J. Presswala i/b Mulla & Mulla Craigie Blunt & Caroe for Respondents Nos.4 and 5.

CORAM : H.L. GOKHALE &
MRS. R.S. DALVI, JJ.

DATE OF RESERVING THE JUDGMENT : 14TH SEPTEMBER 2005

DATE OF PRONOUNCING THE JUDGMENT: 30TH SEPTEMBER 2005

JUDGMENT : (Per H.L. Gokhale J.)

1. This writ petition invoking Article 226 of the Constitution is filed by the assignees of the original lessees of a property owned by the Union of India situated in the Pune Cantonment Board area. It seeks a writ of certiorari, mandamus and prohibition against the Respondents concerning the refusal of the Respondents to sanction the building plans submitted by the Petitioners. Amongst others, the Petitioners seek to challenge the resolution of the Cantonment Board dated 11th October 1996 rejecting the building plans of a commercial complex submitted by the Petitioners in view of the objection raised by the Respondent No.3 - Defence Estate Officer under section 181(3) of the Cantonments Act, 1924 (hereinafter referred to as "the Act").

Respondents Nos.1 to 3 and 6 to this petition are the Union of India, Director of Defence Estate, Pune, Defence Estate Officer (Pune Circle) and the General Officer, Commanding-in-Chief, Southern Command having his Head Office at Pune. Respondents Nos.5 and 4 to the petition are the Pune Cantonment Board and its Executive Officer respectively. The Cantonment Board is the planning authority for the areas covered by it under the scheme of the Act.

2. Shortly stated the submissions of the Petitioners are two-fold. Firstly, that in view of the inordinate delay on the part of the Respondents (as claimed by the Petitioners) in taking the decision within the statutory period on their application for carrying out the construction, the sanction of the Cantonment Board is deemed to be granted under section 181(6) of the Act. The second and alternative submission is that in view of the Respondents not giving any reasons for their impugned refusal, their decision is void and bad in law and is arbitrary and deserves to be set aside. It is submitted that in the area nearby this property, construction for commercial purposes is permitted. Therefore, the prayer for the writ of certiorari to quash the decision of the Respondents and for mandamus directing them to grant the necessary

sanction and also the writ of prohibition not to act thereon.

3. As against this case of the Petitioners, the Respondents submit that granting of any such building permission would be violative of the terms of the lease under which the land was leased out to the original lessees since a prior written consent of GOC-in-C was necessary thereunder. Therefore, the Cantonment Board could have refused to sanction the building plan at the outset under section 181(4)(a) of the Act. Alternatively, it is submitted that in any case the proposal of the Petitioners was forwarded by the Board to the Defence Estate Officer and on receiving his report, the decision has been conveyed to the Petitioners immediately and, therefore, there was no occasion to invoke the deeming provision under section 181(6) of the Act. Thirdly, in any case, it is submitted on merits that the authorities of the Defence Ministry have explained that the land was required to be utilised for married officers' accommodation and hence the plans could not be approved. Thus there is a complete explanation in law and on facts.

4. The short facts leading to this petition are as follows:-

(a) The concerned plot of land bearing Survey No.240 situated on Lothian Road (now known as Lt. Col. Tarapore Road), Pune Cantonment area was taken on lease by one Mr.Rustom Merwanji Master and Mrs. Baimai Rustom Master (hereinafter referred to as "Masters") some time prior to 1946 from the Governor General in Council. The said plot was later-on divided into two sub-plots. The petition is concerning sub-plot No.241-A which was to be used for commercial purpose. The lease was for 30 years. On 13th March 1981, the lease was renewed for 30 years with effect from 1st August 1976 and with a further renewal clause for 30 years thereafter.

(b) On 11th February 1988, the Masters entered into an Assignment of Lease with the 1st Petitioner and the 1st Petitioner thereafter submitted the building plans for approval to the Cantonment Board under section 179 of the Act. The 2nd Petitioner is a partner of the 1st Petitioner. It is the case of the Petitioners that the 5th Respondent - Cantonment Board asked for revision and appropriate changes in the plan from time to time between 26th June 1989 and 28th August 1992 and the Petitioners submitted the revised plans as required. One of the objections raised by the Board was that in the proposed construction a certain ratio for commercial

and for residential use was required to be maintained. The Petitioners filed an Appeal under section 274 of the Act against such direction and under the order passed on 21st June 1991, the Appellate Authority fixed the ratio as 56% for commercial and 44% for residential purpose.

4. The Petitioners submitted the final revised plans on 4th February 1993 and it is the case of the Petitioners that Respondents Nos.4 and 5 forwarded the same to Respondent No.3 - Defence Estate Officer (D.E.O.) as required under section 181(3) of the Act. The D.E.O. returned the said application and plans to the Cantonment Board for certain clarifications by his letter dated 31st March 1993. It is the contention of the Petitioners that this action of Respondent No.3 (D.E.O.) was beyond the period of 30 days as contemplated under section 181(3) of the Act. The Petitioners however did not hear anything from the Respondents and, therefore, on 3rd January 1995 they wrote to the 5th Respondent Board accordingly and asked for the decision on the plans submitted by them. The Respondent No.4 - Chief Executive Officer of the Board wrote back on 9th January 1995 informing that the building plans submitted by the Petitioners were forwarded to Respondent No.3 - D.E.O. as required under section 181(3) of the Act on 7th May 1993 and the report

was awaited. It was specifically stated in this letter that there was no neglect or omission on the part of the Board and that the plans will be still considered on merits after receipt of the report from the D.E.O. The Petitioners continued to follow up the matter with the authorities. Ultimately, in their letter dated 19th September 1996, they mentioned in para 4 and 5 that it appeared that the Board had forwarded their application to the D.E.O. on or about 7th May 1993 and that the period of 30 days for the report from the D.E.O. had expired on 6th June 1993. Thereafter no decision had been received. Therefore, in para 7 of that letter, they called upon the Board to take a decision within 15 days of the receipt of that notice and to make and deliver the reasoned order, failing which the Board shall be deemed to have given sanction. This notice was on the lines of section 181(6) of the Act. The correspondence between the parties continued. On 14th October 1996, the Board informed the Petitioners that it had rejected the Petitioners' building plans by its resolution dated 11th October 1996 in view of the objection by the D.E.O. under section 181(3) of the Act. Later-on, the Petitioners were forwarded the certified copy of the resolution dated 11th October 1996 recording that the building plans were being rejected in view of the D.E.O's. objection dated 3rd October 1996

under section 181(3) of the Act. This finally led to the filing of the present petition.

5. The petition has been opposed by filing affidavits by one Dr.A.K. Kapoor, Defence Estate Officer, on behalf of Respondents Nos.1 to 3 and 6, and by one Shri J. Sharma, Executive Officer of the Cantonment Board for Respondents Nos.4 and 5. In para 8 of the affidavit of Dr.Kapoor, it is specifically stated that under clause 1(5) of the lease with the original lessees, the approval of Respondent No.6 - GOC-in-C was necessary and the Director of Defence and D.E.O. (Respondents Nos.2 and 3) as well as the Board and its C.E.O. (Respondents Nos.5 and 4) had no authority to sanction the building plan without his prior written consent. Therefore, the plans were forwarded to him. In para 26 of the reply, it was stated as to why consent could not be given. Principally, the following reasons have been given therein:-

(i) & (ii) The said plot is located very close to the Supply Depot of the Army and falls in the Married Officers' Zone and therefore is required for the married accommodation and therefore the commercial complex could not be allowed to come up at that site. Besides, it may be accompanied by unsocial and anti-national elements

which is not in the interest of security from military point of view.

(iii) & (iv) The area was already crowded and any permission for new shopping complex will amount to creating further congestion for the already restricted movement of Army traffic. There are 3 petrol pumps in the near vicinity where vehicles are lined up at all times. Shopping complex will aggravate traffic problem.

(v) Lastly, the proposal of the Petitioners was for shopping complex of 58 shops on the ground floor and residential area of 23 rooms on the first floor. Since more than half the lease period had already expired, the proposed construction will be of no use to the Army when the property reverts back to the Government on expiry of the lease.

6. As far as the Cantonment Board is concerned, its Executive Officer Mr.Sharma submitted that the Petitioners' application of 15th January 1993 under section 179 of the Act was forwarded vide his letter dated 4th February 1993 to the D.E.O. Certain clarifications were first sought on 31st March 1993. Later on, the Petitioners were informed on 9th January 1995 that the building plans were forwarded to the

D.E.O. as required under section 181(3) of the Act. In any case, on learning the final objection of the D.E.O. on 3rd October 1996, a resolution was passed on 11th October 1996 and the same was forwarded to the Petitioners on 14th October 1996. The notice under section 181(6) was premature. Therefore the petition was sought to be dismissed.

7. Before we proceed to deal with the submissions of the rival counsel, it would be necessary to refer to section 181 of the Act which is very material for our purpose.

> "**181. Power of Board to sanction or refuse**.- (1) The Board may either refuse to sanction the erection or re-erection, as the case may be, of the building, or may sanction it either absolutely or subject to such directions as it thinks fit to make in writing in respect of all or any of the following matters, namely:-
>
> (a) the free passage or way to be left in front of the building;
>
> (b) the space to be left about the building to

secure free circulation of air and facilitate scavenging and prevention of fire;

(c) the ventilation of the building, the minimum cubic area of the rooms and the number of height of the storeys of which the buildings may consist;

(d) the provision and position of drains, latrines, urinals, cesspools or other receptacles for fifth;

(e) the level and width of the foundation, the level of the lowest floor and the stability of the structure;

(f) the line of frontage with neighbouring buildings if the building abuts on a street;

(g) the means to be provided for egress from the building in case of fire;

(h) the materials and method of construction to be used for external and party walls

for rooms, floors, fire-places and chimneys;

(i) the height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on; and

(j) any other matter affecting the ventilation and sanitation of the buildings,

and the person erecting or re-erecting the building shall obey all such written directions in every particular.

(2) The Board may refuse to sanction the erection or re-erection of any building on any grounds sufficient in the opinion of the Board affecting the particular building.

. Provided that the Board shall refuse to accord sanction the erection or re-erection of any building if such erection or re-erection is not in conformity with any general scheme sanctioned under section 181A.

(3) The Board, before sanctioning the erection or re-erection of a building on land which is under the management of the Defence Estates Officer, shall refer the application to the Defence Estates Officer for ascertaining whether there is any objection on the part of the Government to such erection or re-erection, and the Defence Estates Officer shall return the application together with his report thereon to the Board within thirty days after it has been received by him.

(4) The Board may refuse to sanction the erection or re-erection of any building-

(a) when the land on which it is proposed to erect or re-erect the building is held on a lease from the Government, if the erection or re-erection constitutes a breach of the terms of the lease, or

(aa) when the land on which it is proposed to erect or re-erect the building is entrusted to the management of the Board by the Government if the erection or re-erection constitutes a breach of the

terms of the entrustment of management or contravenes any of the instructions issued by the Government regarding the management of the land by the Board, or

(b) when the land on which it is proposed to erect or re-erect the building is not held on a lease from the Government, if the right to build on such land is in dispute between the person applying for sanction and the Government.

(5) If the Board decides to refuse to sanction the erection or re-erection of the building, it shall communicate in writing the reasons for such refusal to the person by whom notice was given.

(6) Where the Board neglects or omits, for one month after the receipt of a valid notice, to make and to deliver to the person who has given the notice any order of any nature specified in this section, and such person thereafter by a written communication sent by registered post to the Board calls the attention of the Board to the neglect or omission, then, if such neglect

or omission continues for a further period of fifteen days from the date of such communication the Board shall be deemed to have given sanction to the erection or re-erection, as the case may be, unconditionally.

. Provided that, in any case to which the provisions of sub-section (3) apply, the period of one month herein specified shall be reckoned from the date on which the Board has received the report referred to in that sub-section."

8. As the scheme of the Act stands, under section 179 of the Act, a party who wants to erect or re-erect any building in the cantonment area has to give a notice therefor in writing conveying his intention. Thereafter the Board has to either sanction or refuse plan under section 181 of the Act. If the land on which the construction is proposed is under the management of D.E.O., the application is to be referred to him under sub-section (3) of section 181 and he has to make a report within 30 days thereafter. Section 181(4) provides for powers of the Board to outright to refuse sanction for erection or re-erection in three different circumstances; viz. (a) if the erection or re-erection constitutes a breach of the terms of the lease, (aa) if

it is in breach of the terms of entrustment or instructions of the Government, and (b) if the right to build on the land is in dispute between the person applying for sanction and the Government. Sub-section (5) requires the Board to communicate the reasons in the event of refusal. Sub-section (6) of this section lays down that where a notice is given to the Board and the Board neglects or omits for one month after service of such notice to make and/or to deliver a written order as specified in this section to the person giving notice, such a person may draw the attention of the Board to this neglect or omission by one more communication sent by Registered Post. The sub-section further provides that if such neglect or omission continues for a further period of 15 days from the date of such communication, the Board shall be deemed to have given the sanction. The proviso to this sub-section lays down that where sub-section (3) applies, i.e. in case of lands under the D.E.O., the period of one month under the first part of sub-section (6) is to be reckoned from the date on which the Board receives the report under sub-section (3).

9. Dr.Tulzapurkar, learned Senior Counsel for the Petitioners, submitted that as per the affidavit made by Mr.Sharma, the application made by the Petitioners was

forwarded to the D.E.O. on 4th February 1993. The D.E.O. returned the said application on 31st March 1993 for certain clarifications. That, according to him, is the report of the D.E.O. and the same was not made within 30 days as required under section 181(3) of the Act. The Petitioners submit that thus there is a breach of section 181(3) on the part of the D.E.O. That apart, notice was sent under section 181(6) of the Act on 19th September 1996. In para 4 and 5 of this notice, it was clearly stated that the period for the D.E.O. to make his report expired on or about 6th June 1993. In para 7 therefore a specific mention was made to the 15 days period under section 181(6) of the Act pointing out that there is already a continued neglect or omission on the part of the Board and if no reasoned order was forwarded in 15 days, the sanction will be deemed to be granted unconditionally.

10. Mr.Presswala, learned counsel for the Cantonment Board and its Executive Officer, on the other hand, submitted that firstly granting of any such building permission would have been contrary to clause 1(5) of the lease document and, therefore, it would lead to the breach of the terms thereof and the Board could have straightway refused the permission under sub-section (4)(a) of section 181 of the Act. However,

it still forwarded the plans to the D.E.O. for his consideration. He submitted that the letter of the D.E.O. of 31st March 1993 was only for seeking clarification. It could not be said to be a report. In his submission, the report of the D.E.O. was dated 3rd October 1996. The Cantonment Board accordingly passed a resolution on 11th October 1996 rejecting the proposal and informed the Petitioners on 14th October 1996. He submitted that the present rejection of the Petitioners' plans was justified under section 181(4)(a) of the Act. However, even if provision of section 181(6) was examined, considering the above dates, it will be seen that the Cantonment Board had informed the Petitioners about the rejection of their plans within less than two weeks on coming to know about the decision of the D.E.O. Therefore, there was no neglect or omission on the part of the Board and there was no occasion to give any one month's notice as contemplated under the first part of sub-section (6), and thereafter the 15 days notice as contemplated in the later part thereof. In his submission, therefore, there was no delay whatsoever to attract the deeming provision.

11. As far as the submission based on section 181(4)(a) of the Act is concerned, Mr.Presswala pointed out that clause 1(5) of the original lease laid down

certain conditions. This clause reads as follows:-

> "1. AND THE LESSEES DO hereby covenant with the LESSOR:-
>
> .....
>
> (5) Within twelve calendar months next after the date of these presents at their own cost to erect and finish a building fit for both habitation and shops on the premises hereby demised together with all necessary outhouses, sewers, drains and other appurtenances in accordance with the plan or plans to be approved in writing by the Cantonment Board under the provisions of the Cantonment Act and not to erect or suffer to be erected on any part of the premises hereby demised, any building other than and except the building hereby convenanted to be erected **without the previous consent in writing of the Officer Commanding in Chief, Southern Command**." (Emphasis supplied)

Mr.Presswala submitted that as can be seen from the above clause, it is split into two parts. The first part provided that within 12 months from the date of the lease, the lessees were to erect a building fit for habitation and shops. This had already been done by the

Masters. The second part of this clause clearly laid down that the lessees were not to erect any building other than and except the building thereby covenanted to be erected without the previous consent in writing of the Officer Commanding in Chief, Southern Command. Thus, it was clear that for any such reconstruction, the prior consent of the Commanding in Chief was necessary. This was the term which was binding on the lessees and it was known to the Petitioners and it continued to bind them. It was as a part of this utilisation that it was laid down in an appeal of the Petitioners that 56% of the construction was to be for commercial purpose and 44% for the residential purpose. The plot could not be utilised for 100% commercial purpose. It was meant for the accommodation of married officers. If that was the requirement of the Armed Forces, the Petitioners had to abide by that. Any departure therefrom could not be permitted by the Cantonment Board because it would mean permitting a breach of the terms of the lease under section 181(4)(a) of the Act.

12. Mr.Presswala submitted that in the present case, there was no breach of any of the provisions of the statute by the Cantonment Board, but assuming that there was any, that cannot lead to a deeming sanction against the owner of the land who had clearly laid down

in the lease that his prior consent was necessary before resorting to any erection on the concerned plot. Mr.Presswala pointed out that a similar case concerning a dispute between the persons applying for sanction under section 181(4)(b) of the Act came up before a Division Bench of this Court in **Writ Petition No.2236 of 1983 (Kayum Boman Irani & ors. v/s Pune Cantonment Board & ors.) and Writ Petition No.2237 of 1983 (Sheriar Behram Irani & ors. v/s Pune Cantonment Board & ors.)**. Both these petitions were decided by a common judgment rendered on 15th April 1987 by a Division Bench of this Court (Sawant & Kantharia, JJ.). He took us through the said judgment which is unreported. Inasmuch as the said judgment has very much bearing on the issue involved in this matter, we are referring to the facts and proposition laid down therein in detail hereinbelow.

13. The Petitioners in that matter were holding occupancy rights in the land belonging to the Central Government under what was then known as "old grant tenure basis". The Petitioners had sold the land to one Makawana Construction. They applied to the Board for conversion of the old grant tenure into a freehold tenure on 15th January 1980. On 29th January 1980 they gave a notice under section 179 for demolition of the existing structure and construction of a new structure.

On 2nd April 1980, the Board passed a resolution granting sanction under section 181 of the Act. The resolution however stated that the sanction would be effective only when the present rights over the land were converted into freehold by the Competent Authority and the conversion cost is decided by the Government and is deposited by the Applicant. However, a copy of this resolution was not sent to the Petitioners. On 23rd October 1980, the Board sent a copy of the plan to the Petitioners by specifically mentioning that the plans were valid only for procuring cement and not for execution of the work and should not be deemed to be a sanction under section 179 of the Act. This was to facilitate the Petitioners to procure cement since in those days there were a lot of regulations prevailing with respect to procurement of cement. The Petitioners however proceeded to demolish the whole structure with the intention to construct the new one. The Petitioners served a notice on 15th February 1982 under section 181(6) claiming that the plans were in fact sanctioned by the Board and yet the Board had not communicated the formal sanction. They wanted the deeming provision to be brought into force. The Board replied on 1st March 1982 that the plans were released on the Petitioners specific request for cement only and no sanction had been granted and that there was no neglect or omission

on the part of the Board. It had forwarded the Petitioners' proposal for conversion of the old grant tenure into a freehold tenure to the higher authorities and the decision was awaited. The Board therefore gave a notice under section 185 of the Act to remove the construction. The Petitioners' appeal under section 274 of the Act against that notice was dismissed.

14. In December 1982, the Director General, Southern Command advised the Board to prepare a scheme under section 181(2) and submit it to the GOC-in-C for sanction. The Board passed a resolution approving a draft scheme for open spaces and maximum FSI and the GOC-in-C approved it. The petition was filed on 10th February 1983. The High Court admitted the petition granting interim order on 3rd October 1982 staying the demolition of the construction already made.

15. Subsequently the Board passed a resolution stating that a new scheme on building construction as framed by GOC-in-C will become effective from 24th December 1982 under section 181(2) of the Act and even those applications where sanctions were granted subject to conversion into freehold rights will have to conform to the new scheme. In the meanwhile, in spite of the warning and notices to stop the construction, the

Petitioners went ahead with the construction and constructed the entire building.

16. The issue before the Court was as to whether the Board had any authority to sanction the building plans on the date the Petitioners alleged that the Board had sanctioned them. It required an interpretation of section 181(4)(b) of the Act. This was because the case of the Government was that the Petitioners were given only occupancy rights and those rights had to be converted into freehold and until that was done, they had no right to build on such land and thus there was a dispute with respect to their right to build on that land between the persons applying for sanction and the Government within the meaning of that section. The Court went into the prior correspondence and noted that the earliest letter dated 23rd March 1968 by the Under Secretary to the Government of India on the subject of construction of old sites clearly stated in para 3 thereof that the Government of India desired that the sanction to the applications for construction of various types mentioned in the letter be withheld unless the grantee is willing to take out a lease. Thus, there was a dispute within the meaning of section 181(4)(b), namely whether such a conversion was necessary. The Petitioners contended that the grant of such a lease may

come at a later stage, whereas according to the Government, it had to precede any construction. In any case, there was a dispute and therefore there was no question of the Board sanctioning any plans for building construction on such land and the sanction had to be withheld under the said section.

17. The Division Bench noted that subsequently in November 1976, the Government had taken a decision that instead of converting the old grant sites into leasehold sites, they should be converted into freehold sites. That position continued until and during the period when the Petitioners applied for construction.

18. In para 30 of the judgment, the Division Bench held that so long as the land was not converted into freehold by a sale deed, the Board had no alternative but to refuse to sanction the plans for construction, treating the right to build on the land as being in dispute between the Applicant and the Government within the meaning of section 181(4)(b) of the Act. At the end of para 31, it went on to the extent of saying as follows:-

> ". Hence the position which emerges from the aforesaid discussion is that the Board had

no authority whatsoever to sanction any plan for construction of the type mentioned in paragraph 3 of the Government's letter of March 23, 1968 unless and until the land was converted to free hold tenure. There was an initial lack of power or jurisdiction in the Board to sanction such plan till the land was so converted by fulfilling all the conditions on the part of the holder of the land as he was called upon to do by the order sanctioning the conversion."

In para 33, the Court had following to say:-

". The aforesaid events and the correspondence exchanged between the Petitioners and the Board would reveal that although in so many words the Board had not referred to the provisions of Section 181(4)(b) of the Act, the Board had asserted from the beginning that in view of the fact that the Petitioners' application for conversion was pending with the higher authorities no plan for building could be sanctioned or could be deemed to have been sanctioned. ..... We are therefore more than satisfied that the Board

had tried to adhere to the statutory restriction imposed upon it by the Government not to sanction plan under section 179. There was thus no plan sanctioned as required by section 179."

In para 35 and 36, the Division Bench observed as follows:-

"35. Looked at it from yet another angle, **in view of the statutory restrictions placed by the Government on the Board, the Petitioners had no right to submit any building plan and the Board had no right to sanction the same** with or without conditions. All that the Board could have done was to reject the plan relying on the provisions of section 181(4)(b). If that is so, **the Petitioner could not have given the notice under section 181(6)**. The provisions of that section are attracted only when the applicant has a right to get the building plan sanctioned. If on account of statutory restrictions as in the present case, the citizen has no right to construct and the Board has no right to sanction the construction, the said provisions do not come

into play.

36. In the circumstances the question whether the sanction to the plan was published and communicated to the Petitioners on April 2, 1980 when the resolution in question was passed by the Board loses all significance." (Emphasis supplied)

19. As far as the conduct of the parties and the request for composition and regularisation under section 185(1) of the Act, the Court observed in para 48 that the facts militate against it violently. The Petitioners knew from the very beginning that the plan was sanctioned with the condition that it would be effective only when the conversion was completed after full payment of the cost of construction. In spite of that, the Petitioners had gone ahead with the construction. In the circumstances, to condone unauthorised construction would mean to encourage law breakers at the cost of law abiding citizens.

20. In para 49, the Court culled out its conclusion. For our purposes, it is conclusion (8) which is material, which is to the following effect:-

> "(8) The Board was fully justified in not sanctioning the plan or in effect refusing to sanction it for construction, as it did, as it was empowered to do so by the provisions of section 181(4)(b) of the Act read with the Government's letter of March 23, 1968. In the circumstances, the Petitioners could not have resorted to the provisions of section 181(6) and given the notice which they did. The provisions of section 181(6) are inapplicable to the present case. The present is a case of an initial want of authority in the Board to sanction the plan in view of the said statutory instructions of the Government read with section 181(4)(b)."

The Court finally held that since there was no validly sanctioned plan, the Board will have to sanction the plan afresh after the conversion is completed and that the plan will be governed by the building regulations prevailing at the time of the sanction. The petitions were therefore dismissed.

22. We have considered the submissions of the counsel. As far as the present matter is concerned, what is laid down with respect to section 181(4)(b) in

the above matter will apply with greater force since the present case is one under section 181(4)(a) where granting such a permission would be in breach of the terms of the lease. The Petitioners knew what were the terms of the lease and clause 1(5) of the lease restrained them from constructing anything except with the prior permission of GOC-in-C. In the absence of any such permission, any application made to the Board and the Board forwarding it to the D.E.O., who is a subordinate officer, and corresponding with him is futile. Dr.Tulzapurkar submitted that the D.E.O. is a representative of the GOC-in-C and it was his responsibility to forward the application to higher authorities and to get the decision within 30 days as contemplated under section 181(3) of the Act. It is true that where the land is under the management of the D.E.O., it is he who has to find out whether there is any objection on the part of the Government. However, in the present case, the Petitioners knew in advance that prior sanction of the GOC-in-C, who is a much superior officer, was necessary. There was no question of forwarding the application to a subordinate officer and then contending that no decision was taken by him in 30 days from receipt of the application of the party from the Board. The GOC-in-C has the overall power under section 181-A of the Act to sanction general

scheme for prevention of over-crowding etc. In the instant case, the property was required for married officers' accommodation and any commercial exploitation over and above the ratio permitted would have led to over-crowding in defence area. The land would not become available for the purpose for which it was retained. Thus, section 181(4)(a) would have over-riding effect and there was no question of the Board forwarding the application to the D.E.O. when to the knowledge of the Petitioners prior consent of GOC-in-C was necessary. That was as per the term of the lease and it was Petitioners' duty to obtain that consent before applying to the Board under section 179.

23. The acceptance of the submission of the Petitioners would mean that for the alleged failure of the Board, which is the Planning Authority, the owner of the property is to be made to suffer. That certainly cannot be so when the owner had made the terms of lease very clear. Even under the general liabilities of a lessee under section 108 of the Transfer of Property Act, 1882, a lessee must not use or permit another to use the property for the purpose other than that for which it was leased as provided under sub-clause (o) thereof.

24. The Board, however, forwarded the application to the D.E.O. to seek the decision of the Government. It has taken its own time and ultimately the D.E.O. filed the objection in October 1996 and immediately the same was informed by the Board to the Petitioners. Thus, even looking at it from that point of view and assuming that application of section 181(6) is to be examined, the Board has informed the Petitioners immediately and there was no question of even the first part of section 181(6) applying to infer any neglect or omission on the part of the Board for one month after notice. The Board has communicated the decision to the Petitioners much before. There is no occasion therefore to apply the deeming provision.

25. Dr.Kapoor, the D.E.O. has given reasons as to why the land could not be released for the kind of construction applied for. Dr.Tulzapurkar submitted that this course was impermissible and absence of reasons in a statutory decision could not be made good by making submissions subsequently. He relied upon the observations of the Apex Court in para 8 of **Mohinder Singh Gill v. Chief Election Commissioner - AIR 1978 SC 851** and later on in **Union of India v. H.P. Chothia - (1978) 2 SCC 586** to that effect. As stated above, in the present case, the Petitioners themselves have not

followed the proper course. They have not approached the authority whom they were expected to approach under the lease, viz. GOC-in-C. The D.E.O. had no jurisdiction to take any decision when the clause of the lease clearly required a prior written consent from the GOC-in-C. There is a failure on the part of the Petitioners and not on the part of the D.E.O. The communication from D.E.O. cannot be faulted as a case where a statutory order is passed without giving particulars and which are sought to be given subsequently. The propositions in the two cases will therefore not apply to the present controversy.

26. The petition is therefore dismissed with no order as to costs. Although the petition is dismissed, it will be open to the Petitioners to apply to the GOC-in-C for construction according to the norms set up by him, namely that there can be only 56% construction for commercial purpose and 44% construction for residential purpose. Inasmuch as the area is to be retained for married officers' accommodation, the Petitioners will have to offer this 44% accommodation for that purpose. If there is any such willingness on their part, they may apply, and it will be open for the Respondents to consider such application when made.

(H.L. GOKHALE, J.)

(MRS. R.S. DALVI, J.)